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# CONTRACT CLAUSES NONAPPROPRIATED FUND SUPPLY AND SERVICE CONTRACTS (OCONUS VERSION)

For use of this form, see AR 215-4; the proponent agency is ODCSPER

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I-1. DEFINITIONS  
I-2. NONAPPROPRIATED FUND INSTRUMENTALITY  
I-3. COVENANT AGAINST CONTINGENT FEES  
I-4. CHANGES  
I-9. EXAMINATION OF RECORDS  
I-13. EQUAL OPPORTUNITY  
I-20. PAYMENTS  
I-21. DISCOUNTS FOR PROMPT PAYMENT

I-22. INVOICES  
I-25. DISPUTES  
I-27. INSPECTION AND ACCEPTANCE  
I-28. TERMINATION FOR CONVENIENCE  
I-29. TERMINATION FOR DEFAULT  
I-36. SAVE HARMLESS  
I-39. CLAUSES INCORPORATED BY REFERENCE  
I-40. INCONSISTENCY BETWEEN ENGLISH VERSION AND  
TRANSLATION OF CONTRACT

## I-1. DEFINITIONS.

(a) "Head of the agency" (*also called "agency head"*) or "Secretary" means the Secretary of the Army, the Under Secretary, and the term "authorized representative" means any person, or board (*other than the Contracting Officer*) authorized to act for the head of agency or secretary.

(b) "Contracting Officer" means a person with the authority to enter into, administer, and/or terminate contracts on behalf of the nonappropriated fund instrumentality which is a party to this contract and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

## I-2. NONAPPROPRIATED FUND INSTRUMENTALITY.

(a) The Nonappropriated Fund Instrumentality (NAFI) which is party to this contract is a nonappropriated fund instrumentality of the Department of the Army. NO APPROPRIATED FUNDS OF THE UNITED STATES SHALL BECOME DUE OR BE PAID THE CONTRACTOR OR CONCESSIONAIRE BY REASON OF THIS CONTRACT. This contract is not subject to The Contract Disputes Act of 1978.

## I-3. COVENANT AGAINST CONTINGENT FEES.

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty the NAFI shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

## I-4. CHANGES-FIXED PRICE SUPPLY.

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the NAFI in accordance with the drawings, design, or specifications.
- (2) Method of shipment or packing.
- (3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must submit any "proposal for adjustment" (*hereafter referred to as proposal*) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

## I-9. EXAMINATION OF RECORDS.

(a) This clause is applicable if the amount of this contract exceeds \$10,000, and the contract was entered into by means of negotiation. The Contractor agrees that the Contracting Officer or the Contracting Officer's duly authorized representative shall have the right to examine and audit the books and records of the Contractor directly pertaining to the contract during the period of the contract and until the expiration of three years after the final payment under the contract.

(b) The Contractor agrees to include the clause in "a" above, in all subcontracts hereunder that exceed \$10,000.

## I-13. EQUAL OPPORTUNITY (OCONUS).

Contractor agrees in the performance of work under this contract there will be no discrimination against any employee or applicant for employment because of race, creed, color, sex, or national origin.

## I-20. PAYMENTS

The NAFI shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by the NAFI if--

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(a) The amount due on the deliveries warrants it; or

(b) The Contractor requests it and the amount due on the deliveries is at least \$1,000 or 50 percent of the total contract price.

#### **I-21. DISCOUNTS FOR PROMPT PAYMENT.**

(a) In connection with any discount offered in conjunction with a supply contract, time will be computed from the date of delivery of the supplies to the carrier when acceptance is at the point of origin, or from the date of delivery at destination or port of embarkation if delivery and acceptance are at either of these points, or from the date the correct invoice or voucher is received in the office specified by the NAFI, if the latter is later than the date of delivery.

(b) In connection with any discount offered in conjunction with a services contract, time will be computed from the date of completion of the services or from the date the correct invoice or voucher is received in the office specified by the NAFI, if the latter is later than the date of completion of performance.

(c) Supply contracts involving relatively insignificant amounts of services, e.g., for relatively minor installation services, so that the obtaining of such services are not primary purpose of the contract shall be treated solely as a supply contract under this clause unless the services are separately priced under a separate contract line item. Any contract having as a primary purpose thereof the obtaining of services shall be treated under this clause as a services contract, provided, however, that for any contract involving both services and supplies under separate contract line items, each separate contract line item number shall be treated as a separate contract for the purpose of determining the applicability of subparagraphs (b) and (c) of this clause; and provided further, that if an invoice under a contract involving both supplies and services as separate contract line items covers both supplies and services from such separate contract line items rather than invoicing supply items and service items separately, then the latest date calculable under either subparagraph (b) and (c) of this clause shall be applied to determine the propriety of taking a prompt payment discount.

(d) Checks will be mailed or transmitted on or about the same day on which the check is dated. Payment shall be considered made on the date on which a check for such payment is dated.

#### **I-22. INVOICES (JUN 1989).**

(a) An invoice is a written request for payment under the contract for supplies delivered or for services rendered. In order to be proper, an invoice must include as applicable the following:

(1) Name and address of the contractor.

(2) Invoice date.

(3) Contract number or other authorization for supplies delivered or services performed (*including order number and contract line item number*).

(4) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(5) Shipping and payment terms (*e.g., shipment number and date of shipment, prompt payment discount terms*). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(6) Name and address of contractor official to whom payment is to be sent (*must be the same as that on the contract or on a proper notice of assignment*).

(7) Name (*where practicable*), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(8) Any other information or documentation required by the contract (*such as evidence of shipment*).

Invoices shall be prepared and submitted in quadruplicate (*one copy shall be marked "original"*) unless otherwise specified.

(b) For purposes of determining if interest begins to accrue under the Prompt Payment Act, Public Law 97-177, as amended by P.L. 100-496:

(1) A proper invoice will be deemed to have been received when it is received by the office designated in the contract for receipt of invoices and acceptance of the supplies delivered or services rendered has occurred;

(2) Payment shall be considered made on the date on which a check for such payment is dated;

(3) Payment terms (*e.g., "net 20"*) offered by the contractor will not be deemed a "required payment date", and

(4) The following periods of time will not be included:

(i) After receipt of an improper invoice and prior to notice of any defect or impropriety, but not to exceed 7 days (*3 days on contracts for meat food products, and 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils*); and

(ii) Between the date of a notice of any defect or impropriety and the date a proper invoice is received. When the notice is in writing, it shall be considered made on the date shown on the notice.

#### **I-25. DISPUTES.**

(a) This contract is subject to the rules and regulation promulgated by the Secretary of Defense and Secretary of the Army for NAF contracting.

(b) The contract is not subject to the Contract Disputes Act of 1978 (*41 U.S.C. 601-613*).

(c) All disputes arising under or relating to this contract shall be resolved under this clause.

(d) "Claims," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under this clause. The submission may be converted to a claim under this clause, by complying with the submission requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(e) (1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the NAFI against the Contractor shall be subject to a written decision by the Contracting Officer.

(2) For Contractor claims exceeding \$50,000, Contractor shall submit with the claim a certification that--

- (i) The claim is made in good faith;
- (ii) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and
- (iii) The amount requested accurately reflects the contract adjustment for which the Contractor believes the NAFI is liable.

(3) (i) If the Contractor is an individual, the certification shall be executed by that individual.

(ii) If the Contract is not an individual, the certification shall be executed by --

(A) A senior company official in charge at the Contractor's plant or location involved; or

(B) An officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(f) For Contract claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(g) The Contracting Officer's decision shall be final unless the Contractor appeals as provided in paragraph (h) of this clause.

(h) The Contracting Officer's final decision may be appealed by submitting a written appeal to the Armed Services Board of Contract Appeals within 90 days of receipt of the Contracting Officer's final decision. Decisions of the Armed Services Board of Contract Appeals are final and are not subject to further appeal.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

#### **I-27. INSPECTION AND ACCEPTANCE**

Inspection and acceptance will be at destination, unless otherwise provided. Until delivery and acceptance and after any rejections, risk or loss will be on the Contractor unless loss results from negligence of the NAFI.

#### **I-28. TERMINATION FOR CONVENIENCE**

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the NAFI. If this contract is for supplies and is so terminated, the Contractor shall be compensated in a manner identified with AR 215-4, Chapter 7, Section IV. In effect on this contract's extent that this contract is for services, and is so terminated, the NAFI shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination.

#### **I-29. TERMINATION FOR DEFAULT**

(a) (1) The NAFI may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --

- (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
- (ii) Make progress, so as to endanger performance of this contract (*but see subparagraph (a)(2) below*); or
- (iii) Perform any of the other provisions of this contract (*but see subparagraph (a)(2) below*).

(2) The NAFI's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (*or more if authorized in writing by the Contracting Officer*) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the NAFI terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the NAFI for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy; (2) acts of the Government/NAFI in either its sovereign or contractual capacity; (3) fires; (4) floods; (5) epidemics; (6) quarantine restrictions; (7) strikes; (8) freight embargoes; and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor effective date of termination.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the NAFI may require the Contractor to transfer title and deliver to the NAFI, as directed by the Contracting Officer, any

(1) Completed supplies, and

(2) Partially completed supplies and materials, parts, tools, dies, jugs, fixtures, plans, drawings, information, and contract rights (*collectively referred to as "manufacturing materials" in this clause*) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the NAFI has an interest.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the NAFI.

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(h) The rights and remedies of the NAFI in this clause are in addition to any other rights and remedies provided by law or under this contract.

(f) The NAFI shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes Clause. The NAFI may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the NAFI against loss because of outstanding liens or claims of former lien holders.

**I-36. SAVE HARMLESS.**

The Contractor shall save harmless the NAFI and the United States Government from any claims of third parties arising out of or from accidents or incidents involving acts or omissions of the contractor, its officers, agents, or employees, occurring as a result of performance of the terms and conditions of this contract or as a result of operation of NAFI furnished equipment or materials, if any, or of the performance of the services under this contract.

**I-39. CLAUSES INCORPORATED BY REFERENCE.**

This contract incorporates the following supply and service contract clauses by reference as prescribed by AR 215-4 with same force and effect as if they were given in full text. Upon request, the Contracting Officer will make full text available.

NUMBER	TITLE
I-5	OFFICIALS NOT TO BENEFIT
I-6	GRATUITIES
I-7	NEW MATERIAL
I-8	VARIATION IN QUANTITY
I-17	CERTAIN COMMUNIST AREAS
I-18	INSURANCE
I-19	TAXES
I-23	EXTRAS
I-24	ASSIGNMENT OF CLAIMS
I-26	NAFI PROPERTY
I-30	COMMERCIAL WARRANTY
I-31	ACCIDENT PREVENTION, FIRE PROTECTION, AND SANITATION
I-32	RESERVED
I-34	PERMITS AND LICENSES
I-35	REMOVAL OF CONTRACTOR'S EMPLOYEES

**I-40. INCONSISTENCY BETWEEN ENGLISH VERSION AND TRANSLATION OF CONTRACT.**

In the event of inconsistency between any terms of this contract and any translation thereof into another language, the English language meaning shall control.